FILE COPY

Office Supreme Court
FILED
NOV 4 193
CHARLES ELMORE

No. 177

In the Supreme Court of the United States

OCTOBER TERM, 1932

C. V. SORRELLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of Argument	7
Argument:	
I. There is logic and reason to support the conclusion of the court below that the defense of entrapment is narrowly confined to cases where the defendant has not intentionally committed an act prohibited and denounced as a crime by statute	9
II. The defendant having intentionally committed the crime alleged in the indictment, the fact that he was induced to do so by officers of the Government should have been pleaded in bar to further proceedings upon the indictment. No such defense may be raised under the plea of not guilty traversing the indictment	12
III. If in entrapment cases the conduct of the officers is not a defense open to the defendant upon the trial of the general issue, but nevertheless may be noted at any stage of the proceedings by the court, upon its own motion, then the question was one of fact for the decision of the District Court where the witnesses were heard	24
Conclusion	25

CITATIONS

Cases:	
Adams v. *New York*, 192 U. S. 585	23
Andrews v. *United States*, 162 U. S. 420	10
Billingsley v. *United States*, 274 Fed. 86, certiorari denied, 257 U. S. 656	15
Butts v. *United States*, 273 Fed. 35	11
Capuano v. *United States*, 9 F. (2d) 41	11, 19
Casey v. *United States*, 276 U. S. 413	10, 15, 17–18
Cermak v. *United States*, 4 F. (2d) 99	11
Cogen v. *United States*, 278 U. S. 221	23
Corcoran v. *United States*, 19 F. (2d) 901	17
Dowdell v. *United States*, 221 U. S. 325	23
Driskill v. *United States*, 24 F. (2d) 525	19
Fetters v. *United States*, 260 Fed. 142, certiorari denied, 251 U. S. 554	16

Cases—Continued. Page

Ford v. *United States*, 273 U. S. 593 23
Gargano v. *United States*, 24 F. (2d) 625 19
Goldstein v. *United States*, 256 Fed. 813 16
Goode v. *United States*, 159 U. S. 663 10
Gouled v. *United States*, 255 U. S. 298 23
Grimm v. *United States*, 156 U. S. 604 10
Grove v. *United States*, 3 F. (2d) 965, certiorari denied, 268 U. S. 691 13
Lucadamo v. *United States*, 280 Fed. 653 11
Luterman v. *United States*, 281 Fed. 374, certiorari denied (*sub nom. Glans* v. *United States*), 260 U. S. 732 12
Newman v. *United States*, 28 F. (2d) 681, certiorari denied, 279 U. S. 839 13
Newman v. *United States*, 299 Fed. 128 11
O'Brien v. *United States*, 51 F. (2d) 674 11
Olmstead v. *United States*, 277 U. S. 438 9
Orsatti v. *United States*, 3 F. (2d) 778, certiorari denied, 268 U. S. 694 13
Patton v. *United States*, 42 F. (2d) 68 19
People v. *Defore*, 242 N. Y. 13 9
Price v. *United States*, 165 U. S. 311 10
Rosen v. *United States*, 161 U. S. 29 10
St. Clair v. *United States*, 17 F. (2d) 886 16
Segurola v. *United States*, 275 U. S. 106 23
Shields v. *United States*, 26 F. (2d) 993, certiorari denied, 278 U. S. 633 12
Spring Drug Co. v. *United States*, 12 F. (2d) 852 19
State v. *Blalock*, 61 N. C. 242 21
State v. *Keith*, 63 N. C. 140 21
State v. *Morgan*, 95 N. C. 641 21
United States ex rel. Hassel v. *Mathues*, 22 F. (2d) 979 20
United States v. *Barber*, 219 U. S. 72 23
United States v. *Echols*, 253 Fed. 862 20
United States v. *Kissell*, 218 U. S. 601 23
United States v. *Murdock*, 284 U. S. 141 21
United States v. *Oppenheimer*, 242 U. S. 85 21
United States v. *Pappagoda*, 288 Fed. 214 19
United States v. *Wilson*, 7 Pet. 150 21
Weeks v. *United States*, 232 U. S. 383 ..... 9, 23
Woo Wai v. *United States*, 223 Fed. 412 11
Ybor v. *United States*, 31 F. (2d) 42 ..... 11, 16
Zucker v. *United States*, 288 Fed. 12, certiorari denied, 262 U. S. 750, 756 11

Miscellaneous:
1 Hale, Pleas of the Crown, 467 21
2 Hawkins, Pleas of the Crown, 560 et seq 21
1 Archbold, Criminal Procedure, 112 22

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 177

C. V. SORRELLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 19. The majority and dissenting opinions in the Circuit Court of Appeals (R. 26–40) are reported in 57 F. (2d) 973.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 15, 1932. (R. 41.) The petition for certiorari was filed June 27, 1932, and was granted October 10, 1932, limited "to the question whether the evidence was sufficient to go to the jury

upon the issue of entrapment." (R. 42.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the evidence in the case was sufficient to go to the jury upon the issue of entrapment.

STATEMENT

An indictment in two counts was returned against petitioner in the District Court for the Western District of North Carolina charging the possession and sale of one-half gallon of whisky on July 13, 1930, in violation of the National Prohibition Act. (R. 1.)

Petitioner's sole defense at the trial was that of entrapment. To prove the charges contained in the indictment, the Government called as witnesses two Federal prohibition agents, Martin and White. The purchase upon which the indictment was based was made by Martin. He testified that on Sunday, July 13, 1930, he visited petitioner's home and "in consequence of a conversation had with the defendant the defendant went off and returned shortly with a half-gallon of liquor for which the witness paid defendant the sum of $5.00." (R. 6.) Upon cross-examination Martin explained that this purchase was made under the following circumstances (R. 6–8):

> That he visited the home of the defendant on July 12th, 1930, at which time the defendant

was not at home and that he made such trip in company with two or three young men who were residents of the community in which the witness was temporarily staying. That on Sunday afternoon, July 13th, 1930, the witness again visited the home of the defendant, accompanied by Fanning Lowe, E. D. Jones, and C. J. Snyder. That upon their arrival at the home of the defendant the witness was introduced to the defendant by Fanning Lowe the witness being introduced as a resident of Charlotte, N. C., and a tourist stopping for the time being at Clyde, N. C. That the witness had a considerable conversation with the defendant, lasting between fifteen and thirty minutes and that during the conversation the witness ascertained that the defendant was a veteran of the World War and a former member of the 30th Division A. E. F. That the witness informed the defendant that he, the witness, was also an ex-service man and was also a former member of the 30th Division A. E. F., which in reality was the truth. That the witness asked the defendant if he, the defendant, could get him, the witness, some liquor and that at first the defendant stated that he did not have any liquor. That later in the conversation the witness again asked the defendant if he, the defendant, could get him, the witness, some liquor and that there was further conversation between the two relative to the securing of some liquor. That at the time of such conversation one of those present to wit, E. D. Jones,

was also an ex-service man and a former member of the 30th Division A. E. F. and some conversation was had between all present relative to the war experiences of the witness, the defendant and E. D. Jones. That the witness a third time asked the defendant to get him, the witness, some liquor and thereupon the defendant left his home and was gone a few minutes and came back with a half-gallon of liquor, for which the witness paid the defendant the sum of $5.00. That the witness was the first and only person among those present at the time who said anything about securing some liquor and was the first person to mention the subject. That the witness at the time he asked the defendant to secure some liquor for him, the witness, did so with the express view and purpose in mind to indict and prosecute the defendant for procuring and selling the liquor and that such was the purpose of the witness when he went to the home of the defendant and procured the liquor.

Martin also testified, on direct examination, over objection, that in August he accompanied agent White to petitioner's home to purchase another half gallon of whisky (R. 6), and White testified that petitioner sold him the whisky for $6, and said he "would guarantee it would be all right" (R. 4). White also testified that two weeks later, in company with Martin and another man, he searched the premises around the petitioner's house and found eleven one-half gallon fruit jars full of

whisky in a thicket about 100 yards below the house and a ten-gallon keg containing between three and four gallons of wine in a field just above the house. (R. 4, 13–16.) This search was made pursuant to a search warrant. (R. 14.)

The petitioner called as witnesses three men who were present when Martin made the purchase of July 13th. (R. 8–10, 10–11, 11–12.) These witnesses confirmed Martin's testimony. They were all residents of the community and acquaintances of the defendant. Two of them, Jones and Snyder, accompanied Martin to defendant's home, and Jones, who had "soldiered" in France with defendant, introduced Martin as a member of the 30th Division, A. E. F., in which all three men had served during the War. (R. 8–9.)

One of these witnesses testified that he knew that petitioner had been employed by a wood fibre company at Canton, North Carolina, since, 1924, and that he saw petitioner at work there practically every day. (R. 9–10.) This testimony was corroborated by the timekeeper and assistant paymaster of the company, who testified that petitioner had been "on his job continuously without missing a pay day since March, 1924." (R. 10.)

Neighbors of petitioner, who had known him for a number of years, testified that he bore a good reputation in the community. (R. 12–13.)

To rebut this testimony the Government called a number of witnesses who testified that petitioner

had the general reputation of being a rum runner. (R. 16–17.) Martin did not state what, if any, knowledge or information he personally had regarding petitioner before he went to his home on July 13, 1930. (R. 6–8.)

The record discloses no prior conviction of petitioner under the National Prohibition Act or any State liquor law.

Motions for a directed verdict were made by petitioner at appropriate intervals during the trial. These motions were denied and exceptions noted. (R. 8, 13, 17.)

Petitioner also presented certain requests for instructions on the subject of entrapment. (R. 17–18.) These were refused and an exception taken. (R. 17.) The trial judge charged the jury that as a matter of law the evidence did not show that petitioner was induced or entrapped to sell liquor. (R. 19.) Petitioner excepted to this charge (R. 19), and the jury returned a general verdict of guilty (R. 2, 19). After the denial of motions in arrest of judgment and to set aside the verdict, petitioner was sentenced to 18 months in the penitentiary. (R. 3, 19.)

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of conviction was affrmed, one judge dissenting. (R. 26–40.)

This Court granted certiorari, the argument to be "limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment." (R. 42.)

SUMMARY OF ARGUMENT

Since the defendant has intentionally committed all the acts constituting the crime charged against him, there is logical force to the view of the court below that the courts may not absolve him from guilt because an officer of the Government instigated the crime. We submit this view upon the opinion of the court below.

This position, however, is not supported by decisions in other Federal courts, which hold that the "defense" of entrapment is maintainable if the crime was induced by Government agents under circumstances which open the Government's action to condemnation upon grounds of public policy. We believe that there undoubtedly are cases where conduct on the part of Government officers is so plainly the provocation for violation of law that public policy requires that the courts should not permit a prosecution for such violation to continue. However, such conduct does not give rise to a defense, but rather calls into operation the courts' power to prevent official abuses.

Where the defendant's act has not been deprived of its criminality by conduct of the officer, the issue of entrapment can not properly be raised under a plea of not guilty, for inquiry regarding the actions of Government officials leads to examination of collateral and sometimes extremely prejudicial matters (such as suspicions of defendant's past criminality, his reputation in the community, and

evidence of other crimes) and prevents orderly inquiry by the same jury as to the defendant's guilt or innocence of the act charged. We submit, therefore, that the issue should be raised in advance of trial of the general issue, by a special plea in bar, since the defendant does not contend that he is not guilty, but that, for reasons of public policy, he should not be prosecuted. The procedure we suggest is supported by the rules of pleading in analogous situations, and will prevent the intrusion of confusion and prejudice. If, as we contend, the issue of entrapment could be raised only by a special plea in bar, the District Court did not err in declining to submit the question to the jury.

If it be said that, although the defense of entrapment is not open to the defendant upon a plea of not guilty, the court may nevertheless, on its own motion and at any stage of the proceedings, decline to proceed with the case for reasons of public policy, then we submit that the question whether the officer's conduct was proper must be decided by the judge, and not by the jury, whether it be one of fact or of law. In this view of the matter the decision below should be affirmed, on the ground that the District Judge concluded that the evidence did not sustain the defense; or, if it be thought that the Judge did not determine the questions of fact, the case should be remanded to the District Court for adjudication by the court of the issue whether defendant was entrapped.

ARGUMENT

We are not concerned with the admissibility of evidence obtained by officers of the Government in violation of statutory or constitutional provisions. Cf. *Olmstead* v. *United States,* 277 U. S. 438, 467, and *Weeks* v. *United States,* 232 U. S. 383. See also *People* v. *Defore,* 242 N. Y. 13. The act denounced as criminal by the statute was proved by undisputed evidence and the jury has found the defendant guilty. (R. 19.) The statute declared the act punishable, and the defendant has accordingly been sentenced. The only question presented is whether, upon the trial of the general issue tendered under a plea of not guilty, the jury should have been instructed to consider the issues arising with respect to the so-called "defense" of entrapment.

I

THERE IS LOGIC AND REASON TO SUPPORT THE CONCLUSION OF THE COURT BELOW THAT THE DEFENSE OF ENTRAPMENT IS NARROWLY CONFINED TO CASES WHERE THE DEFENDANT HAS NOT INTENTIONALLY COMMITTED AN ACT PROHIBITED AND DENOUNCED AS A CRIME BY STATUTE

The court below affirmed the conviction, holding broadly that a defense of entrapment may be maintained only where as the result of official inducement or deception the accused has committed a crime which he did not intend to commit, or where by reason of the consent implied in the inducement no crime has in fact been committed.

This Court has never sustained a defense of entrapment, or determined the basis upon which such a defense may be predicated. In a number of cases arising under the Postal Laws, in which officers of the Government, having information that the law was being violated, had written decoy letters requesting the defendant to send obscene matter through the mails, this Court has held that such inducement is no defense in a prosecution for acceding to the officer's request. *Rosen* v. *United States,* 161 U. S. 29, 42; *Andrews* v. *United States,* 162 U. S. 420; *Price* v. *United States,* 165 U. S. 311. See also *Grimm* v. *United States,* 156 U. S. 604; *Goode* v. *United States,* 159 U. S. 663. With the exception of cases of this class, the only decision of this Court in which such a defense has been discussed is *Casey* v. *United States,* 276 U. S. 413, where the majority of the Court declined to consider a defense of entrapment in the absence of objection taken in this Court or in the court below, because it could only do so upon its own motion and upon a record which was not intended to present the grounds for judgment upon that question.

Mr. Justice Brandeis and Mr. Justice Butler, dissenting from the judgment of the Court in the *Casey case,* were of the opinion that the defense should have been sustained on the Court's own motion and the prosecution stopped by vacating the

judgment of conviction with direction to quash the indictment.

The logical basis for the conclusion reached by the court below is found in the fact that the statute has denounced the act as a crime; that the act thus denounced has been committed by the defendant, whose acts involve all the elements of the crime; that under these circumstances the temptation held out to the defendant is no defense; and that unless authorized by statute the courts may not absolve the defendant from guilt or interpose a bar to the prosecution because an officer of the Government has instigated the crime.

Although this view is opposed by decisions of the Circuit Courts of Appeals in all of the other Circuits except the newly organized Tenth Circuit,[1] it presents a logical view of the matter which is open for consideration in this Court. And we submit the question upon the reasoning set forth in the opinion of the court below.

---

[1] See *Capuano* v. *United States*, 9 F. (2d) 41 (C. C. A. 1st); *Lucadamo* v. *United States*, 280 Fed. 653 (C. C. A. 2d); *Zucker* v. *United States*, 288 Fed. 12 (C. C. A. 3d); certiorari denied, 262 U. S. 750, 756; *Newman* v. *United States*, 299 Fed. 128 (C. C. A. 4th); *Ybor* v. *United States*, 31 F. (2d) 42 (C. C. A. 5th); *Cermak* v. *United States*, 4 F. (2d) 99 (C. C. A. 6th); *O'Brien* v. *United States*, 51 F. (2d) 674 (C. C. A. 7th); *Butts* v. *United States*, 273 Fed. 35 (C. C. A. 8th); *Woo Wai* v. *United States*, 223 Fed. 412 (C. C. A. 9th).

II

THE DEFENDANT HAVING INTENTIONALLY COMMITTED THE CRIME ALLEGED IN THE INDICTMENT, THE FACT THAT HE WAS INDUCED TO DO SO BY OFFICERS OF THE GOVERNMENT SHOULD HAVE BEEN PLEADED IN BAR TO FURTHER PROCEEDINGS UPON THE INDICTMENT. NO SUCH DEFENSE MAY BE RAISED UNDER THE PLEA OF NOT GUILTY TRAVERSING THE INDICTMENT

Although the court below broadly held that a defense of entrapment may not be interposed if the voluntary acts of the defendant involve all the elements of a crime, the Circuit Courts of Appeals in all the other Circuits except the Tenth have under varying circumstances held the defense good if the crime charged was induced or instigated by governmental officers under circumstances which must be condemned upon grounds of public policy.[2] It is difficult to deduce from these decisions a general rule applicable in every case. The inquiry in each case is not whether the defendant committed the act which the statute denounces as a crime, but whether the officers were justified, under all the circumstances, in doing what they did to catch him in a violation of law.[3] These decisions rest upon

---

[2] See footnote 1, *supra*, p. 11.

[3] It is clear, of course, that no question of entrapment is presented where a crime has already been committed and the accused is induced merely to disclose evidence of his wrongdoing. *Shields* v. *United States*, 26 F. (2d) 993 (App. D. C.), certiorari denied, 278 U. S. 633; *Luterman* v. *United States*, 281 Fed. 374 (C. C. A. 3d), certiorari denied (*sub nom. Glans* v. *United States*), 260 U. S. 732. Similarly, where a defendant suggests a course of criminal

grounds of public policy, recognized by the refusal of the courts to countenance the instigation of crimes by agents of the Government seeking to bring innocent people into the toils of the law. The reasoning which is opposed to the view of the court below is that the courts may, in order to protect the Government itself from the illegal conduct of its officers, and to preserve the purity of the courts in their administration of the law, decline to entertain prosecutions for crime instigated by officers of the Government. We are inclined to think that this is the proper view, because we know of no agency other than the courts which can effectively restrain the provocation of crime by agents of the Government when such abuses arise. The courts are the constituted agencies for the protection of the individual against the misuse of authority.

If the courts have, and are to exercise, the power to say that a man shall not be prosecuted or punished for an act which Congress has denounced as criminal, it is a matter of great importance for this Court to determine in what manner, and under what circumstances, this extraordinary power shall be exercised. Its exercise in the lower Federal courts is a matter of comparatively recent growth,

---

action by some overt act, officers may, for the purpose of apprending him, cooperate with him unrestrainedly. *Newman* v. *United States*, 28 F. (2d) 681 (C. C. A. 9th), certiorari denied, 279 U. S. 839; *Grove* v. *United States*, 3 F. (2d) 965 (C. C. A. 4th), certiorari denied, 268 U. S. 691; *Orsatti* v. *United States*, 3 F. (2d) 778 (C. C. A. 9th), certiorari denied, 268 U. S. 694.

but of increasing frequency. (The defense no doubt had its origin in those cases where the acts of provocation in themselves deprive the act of the defendant of criminality.) In such cases the defense was not that the defendant committed the crime only because provoked to do so by officers of the Government, but that he had committed no crime at all. These are the cases in which the court below held the defense of entrapment to be proper. In such cases the issue is properly raised by a plea of not guilty. But where the defendant's act involves all the elements of a crime, and nothing that any officer has done has deprived it of criminality through the elimination of one of its essential elements, we submit that the issue can not properly be raised under a plea of not guilty.

We are not impelled to take this position in deference to a formal rule of procedure. The fact is that any inquiry regarding the conduct of the officers is quite inconsistent with an orderly inquiry by the same jury as to the defendant's guilt or innocence of the act charged in the indictment. In the first place, in determining whether the action of the officers was justified, the grounds they had for suspecting that the defendant was a lawbreaker, willing to violate the law if safe from detection, must be considered in every doubtful case. Complaints as to the past conduct of the defendant, knowledge and information brought to the attention of the authorities with respect to the defendant's activities preceding the offense in question,

and his reputation in the community are often relevant in justification of the action of the detecting officers.

The scope of the proof is well illustrated in the decided cases.

The opinions of this Court in the *Casey case* clearly indicate the character of the collateral issues which may be raised under such a defense as including circumstantial evidence or information concerning prior offenses sufficient to create probable cause for believing the defendant an habitual violator of the law—indeed, all the circumstances preceding the officers' transactions with the defendant which would justify or condemn their action (in the particular case) or have any tendency to show whether the defendant was an innocent man led into crime by officers of the law, or was ready and willing to violate the law if satisfied that the parties to the criminal transaction could be trusted not to betray him.

Thus, in *Billingsley* v. *United States,* 274 Fed. 86 (C. C. A. 6th), certiorari denied, 257 U. S. 656, the defendants were prosecuted for the illegal transportation of intoxicating liquors. The defense was that the accused had been enticed to violate the law by an agent of the Government, who encouraged and cooperated with them in the unlawful scheme. The prosecution was permitted to introduce evidence to show the officer's good faith, which disclosed that the accused, though ostensibly engaged in a lawful business, had for years past

participated in unlawful transactions of the character charged.

Similarly, in *Ybor* v. *United States,* 31 F. (2d) 42 (C. C. A. 5th), the court admitted evidence that a brewery, of which the defendant was an officer, had with defendant's knowledge been regularly paying protection money to Government agents as bearing on the issue whether the defendant had intended to pay the bribe for the giving of which he was being prosecuted, and as relevant to disprove the existence of unlawful entrapment.

Like inquiry into previous reputation and conduct was allowed in *Goldstein* v. *United States,* 256 Fed. 813 (C. C. A. 7th), and *Fetters* v. *United States,* 260 Fed. 142 (C. C. A. 9th), certiorari denied, 251 U. S. 554, to the apparent prejudice of the defendants. *St. Clair* v. *United States,* 17 F. (2d) 886 (C. C. A. 8th), states the rule frequently followed by the courts in disposing of the issue of entrapment, that where officers have reasonable cause to believe that the defendant has been violating the law, they may entrap him by suggesting a particular violation or by pretending participation in the crime. Where the defense is raised, therefore, the door is opened to practically unlimited declarations of suspicions concerning previous offenses, though the testimony introduced on that score clearly falls short of actual proof of wrongdoing; for, if proof of earlier crimes was at hand, the use of deception in order to obtain evidence to support the immediate prosecution would not be required.

The confusion which results from the trial of the issues raised by such a defense is shown by the situation which arose in *Corcoran* v. *United States,* 19 F. (2d) 901 (C. C. A. 8th). In that case the defendants objected to the admission of testimony that the authorities had received numerous complaints in person, by telephone and by letter, to the effect that the defendants were in the bootlegging business, and that these complaints were received prior to the time when the agents first approached the defendants on the subject of furnishing them with alcohol. These objections having been sustained, the court held that they could not thereafter consistently ask the court to consider the defense of entrapment. The unfairness of this ruling is quite obvious, since it compelled defendants on trial under a plea of not guilty either to abandon the defense of entrapment or to consent to the admission of testimony incompetent and highly prejudicial upon the trial of the general issue.

The collateral character of the issues raised by such a defense is demonstrated by the nature of the defense itself, which is well defined in the dissenting opinion of Mr. Justice Brandeis in the *Casey case, supra.* There it was said (276 U. S. at p. 423):

> The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal

> conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature. If Casey is guilty of the crime of purchasing 3.4 grains of morphine, on December 31st, as charged, it is because he yielded to the temptation presented by the officers. *Their conduct is not a defence to him.* For no officer of the Government has power to authorize the violation of an Act of Congress and no conduct of an officer can excuse the violation. But it does not follow that the court must suffer a detective-made criminal to be punished. To permit that would be tantamount to a ratification by the Government of the officer's unauthorized and unjustifiable conduct. (Italics ours.)

And in conclusion it was said (p. 425):

> The prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts. In my opinion, the judgment should be vacated with direction to quash the indictment.

We believe this to be a correct characterization of the nature of the defense. There is nothing in the majority opinion in the *Casey case* to indicate that upon a proper record the nature of the defense would have been regarded differently by this Court. If it is not to be differently characterized, the conclusion follows that the matter should be

brought to the Court's attention upon motion so that the Court may act in the premises if public policy requires, or by plea in bar in advance of the trial on the general issue raised by a plea of not guilty. Any other procedure must prevent an orderly trial of the issues.

We are not unmindful that the usual practice in the several Circuits has been to try the issue of entrapment upon a plea of not guilty, but we believe that this has been done in the absence of objection and consideration of the question.[4]

The practice, however, has not been uniform. In *United States* v. *Pappagoda,* 288 Fed. 214 (Conn.), the defendant filed a plea in abatement and moved to quash the indictment on the ground that he had been entrapped. The court said the practice was unusual and unprecedented, and that the proper practice as indicated by the authorities was to raise the question on trial by a proper request to charge the jury. However, the court considered the merits, denied the motion, and overruled the plea. In *Spring Drug Co.* v. *United States,* 12 F. (2d) 852 (C. C. A. 8th), the District Court entertained and denied a motion to abate the indictment and to suppress the evidence because the sale of

[4] See *Patton* v. *United States,* 42 F. (2d) 68 (C. C. A. 8th); *Driskill* v. *United States,* 24 F. (2d) 525 (C. C. A. 9th); *Gargano* v. *United States,* 24 F. (2d) 625 (C. C. A. 5th); *Capuano* v. *United States,* 9 F. (2d) 41 (C. C. A. 1st). But cf. *United States* v. *Poppagoda,* 288 Fed. 214 Conn.).

narcotics had been instigated by Government agents engaged in a conspiracy to entrap the defendant. The Circuit Court of Appeals did not consider the propriety of this practice. In *United States ex rel. Hassel* v. *Mathues,* 22 F. (2d) 979 (E. D. Pa.), the defendants, held after hearing before a United States Commissioner to await the action of the grand jury, were discharged on a writ of habeas corpus upon the showing of entrapment made before the Commissioner, the court saying: "The policy of the law will not permit a prosecution based on such entrapment to be carried on." In *United States* v. *Echols,* 253 Fed. 862 (S. D. Tex.), upon a plea of guilty tendered by the defendant, the court of its own motion examined the defendant and the officers concerned in his arrest. Being satisfied that the officers had instigated the crime, the court declared that the rule of public policy required that the plea of guilty offered by the defendant be refused and the case dismissed.

While the authorities indicate that in a clear case the court, being satisfied upon the evidence adduced at any stage of the proceedings, may upon its own motion stop the prosecution and dismiss the indictment, there must, of course, be some inquiry regarding the facts in each case to determine whether the rule of public policy should or should not be applied. It may be that in the enforcement of this rule decision should rest exclusively with the court, and that conflicting inferences to be

drawn from the facts established should be drawn by the judge and not by the jury. If this be true, then the District Court in the case at bar was justified in declining to submit the question of entrapment to the jury, and the only question here presented would be whether upon any view of the facts he was justified in excluding the defense of entrapment.

If, however, the issue may be raised by the defendant, as other issues are, it should, we submit, be raised in advance of the trial of the general issue by special plea in bar, since the defendant's contention necessarily is that regardless of his guilt or innocence of the crime charged in the indictment he should not, for reasons of public policy, be put upon his defense.

The situation is closely analogous to a plea of pardon and pleas of *autrefois convict* or *autrefois acquit*. In such cases the defendant does not deny his guilt but sets up special facts in bar upon which the court must conclude, if his plea be sustained, that he may not be prosecuted, regardless of his guilt or innocence of the crime charged. Such defenses must be raised by special plea in bar. *United States* v. *Murdock*, 284 U. S. 141, 151; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Wilson*, 7 Pet. 150; *State* v. *Morgan*, 95 N. C. 641; *State* v. *Blalock*, 61 N. C. 242; *State* v. *Keith*, 63 N. C. 140; 1 *Hale, Pleas of the Crown*, 467; 2 *Hawkins, Pleas of the Crown*, 560 *et seq.*

The form of the plea of *autrefois acquit* indicates the precise analogy of such a plea to the defense of entrapment, for it recites that the defendant, coming into court and having heard the indictment read, "saith that our Lady the Queen ought not further to prosecute the said indictment against him," because he has already been acquitted of the charge. 1 *Archbold, Criminal Procedure* 112. So in this case the plea of the defendant, after having been indicted for an act which the statute denounces as a crime, is that he cometh into court and saith that because his crime was instigated by officers of the Government, the United States ought not further to prosecute the indictment against him. Such a plea can have no relation to the plea of not guilty, for the defendant's commission of the act charged in the indictment is entirely irrelevant upon the disposition of the plea.

While at common law any special matter may be adduced in support of the plea of not guilty to show that the defendant did not commit the crime with which he is charged, this principle clearly does not open the general issue to special defenses in bar which present matters entirely collateral to the charge in the indictment. To insist upon these rules of pleading in the conduct of criminal proceedings is not to insist upon the form and disregard the substance, because this and many other cases clearly show that the intrusion of the collateral issues, upon which the application of the rule of public policy

must depend, into the trial of the issue of guilt or innocence of the act charged, must inevitably result in confusion and prejudice.

Such confusion is avoided, even in cases involving constitutional rights, by insistence that the collateral issues shall whenever possible be determined in advance of trial. See *Cogen* v. *United States*, 278 U. S. 221, 223; *Segurola* v. *United States*, 275 U. S. 106; *Gouled* v. *United States*, 255 U. S. 298, 305; *Weeks* v. *United States*, 232 U. S. 383; *Adams* v. *New York*, 192 U. S. 585, 594.

The apparent object of all rules of pleading is not only to prevent surprise but to avoid confusion and prejudice in the trial of issues, and courts have rightly been insistent in confining the trial of the general issue in a criminal case to the issues raised by the plea of not guilty which traverses all the allegations of the indictment.[5] A corollary which proves the rule is that a special plea in bar which traverses the allegations of the indictment will not be sustained. *United States* v. *Kissell*, 218 U. S. 601.

If, as we maintain, the defense of entrapment may be raised by the defendant only by special plea in bar, the District Court did not err in failing to submit the question of entrapment to the jury.

---

[5] Compare *Ford* v. *United States*, 273 U. S. 593, 605–606; *Dowdell* v. *United States*, 221 U. S. 325, 332; *United States* v. *Barber*, 219 U. S. 72, 78.

III

IF IN ENTRAPMENT CASES (THE CONDUCT OF THE OFFICERS) IS NOT A DEFENSE OPEN TO THE DEFENDANT UPON THE TRIAL OF THE GENERAL ISSUE, BUT NEVERTHELESS MAY BE NOTED AT ANY STAGE OF THE PROCEEDINGS BY THE COURT, UPON ITS OWN MOTION, TEEN THE QUESTION WAS ONE OF FACT FOR THE DECISION OF THE DISTRICT COURT WHERE THE WITNESSES WERE HEARD

We submit that upon the facts disclosed by the testimony of the witnesses with reference to the occurrences preceding the arrest of the defendant, viewed in the light of the testimony of three witnesses who testified orally in the presence of the court that he enjoyed the reputation of a bootlegger and a liquor dealer in the community in which he lived, coupled with the fact that shortly after the sale in question he made another sale, and upon a search of his premises was found to be in possession of a large store of liquor, the question of entrapment was one of fact; and if the District Judge concluded as a matter of fact that there was no merit in the defense, he was justified by the evidence in so doing. Such inferences may be properly drawn only by the judge who hears and sees the witnesses, and we submit that the question was essentially one of conflicting inferences of fact, to be predicated upon the weight to be given to the testimony of the witnesses who appeared in person before the District Court.

Unless the question was properly triable under the general issue, there was no error in declining to submit the question to the jury. If, however,

it was a question turning upon considerations of public policy to be determined by the court, then the decision below should either be affirmed upon the assumption that the District Judge himself concluded that the defense was not sustained by the evidence, or, if it be thought that he failed to determine the issues of fact, the case should be remanded to the District Court for the determination of the issue by the District Judge, for he alone was in a position to judge the credibility of the witnesses and to weigh the evidence accordingly.

CONCLUSION

It is submitted that the judgment below should be affirmed or, if not affirmed, that the case should be remanded to the District Court for determination of the issues of fact relating to the conduct of the arresting officer.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
JOHN T. BYRNE,
WALTER GELLHORN,
Attorneys.

NOVEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932